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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
10

11 GENEXA INC.,
12 Plaintiff,
13 v.
14 KINDERFARMS LLC,
15 Defendant.
16

CASE NO. 2:22-cv-09291

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT KINDERFARMS
LLC'S MOTION TO DISMISS,
MOTION TO STRIKE, AND
SPECIAL MOTION TO STRIKE
(ANTI-SLAPP)**

*[Filed Concurrently with Notice of
Motion and Motion to Dismiss
Plaintiff's Complaint, Motion to Strike,
and Special Motion to Strike (Anti-
SLAPP); Declaration of David W.
Schechter; Request for Judicial Notice;
and [Proposed] Order]*

Hearing Date: February 13, 2023
Hearing Time: 10:00 a.m.
Location: Courtroom 5A

Complaint Filed: December 22, 2022
Trial Date: Not yet set

Assigned to: The Honorable
Michael W. Fitzgerald and Magistrate
Judge Steve Kim

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Defendant KinderFarms LLC (“Defendant” or “KinderFarms”) hereby submits this Memorandum of Points and Authorities in support of its Motion to Dismiss, Motion to Strike, and Special Motion to Strike (the “Motion”):

I. INTRODUCTION

Founded by parents, KinderFarms provides families with effective, values-driven medicine and health products. KinderFarms produces hydration products under its KinderLyte brand, organic protein shakes under its KinderSprout brand, and over-the-counter (“OTC”) medicine products under its KinderMed brand.

Genexa, Inc. (“Genexa”) and KinderFarms compete in only three products in the OTC medicine product category currently, and that is the only product category the companies overlap. They use different trade names, different ingredients, and different packaging to present their products to consumers.

Instead of competing with KinderFarms on the merits of their products, Genexa chose to hire lawyers to file a fatally flawed Complaint riddled with easily disprovable claims and incorrect facts. Genexa will fail in its misguided strategy to restrict fair competition in the clean OTC medicine industry as the Complaint is a house of cards that falls under the weight of its own allegations.

Genexa devotes paragraphs to complain about how KinderFarms “copied” the ingredients, but these allegations are refuted by Genexa’s own Complaint. Genexa claims it came up with a revolutionary way to replace artificial preservatives with a combination of agave syrup and “citrus extract,” but KinderFarms uses citric acid. Citric acid is not the same as “citrus extract.” Thus, Genexa’s “copying” theory makes no sense. But this is all a meritless distraction because Genexa sold its medicine to the public without a patent. As such, its products are in the public domain.

Genexa then alleges KinderFarms “copied” its packaging to “confuse” consumers, but Genexa does not own any trademark rights in its packaging. Even if it did, the pictures reveal stark and fundamental differences, including the trade names (“KinderMed” is not “Genexa”), the layout and design elements on the front, as well

1 as the fonts, size, placement, colors, and materials (KinderMed uses distinctive
2 metallic foil), and the design elements themselves (a female lion is not a multi-colored
3 unicorn). Even worse, Genexa deliberately chose not to show pictures of its other
4 medicine products, as those packages reveal even starker differences. KinderFarms
5 submits those packaging designs so the Court and public are fully informed.

6 Genexa then cobbles together random statements coupled with hyperbolic
7 language and scare tactics to present false advertising claims that fail as a matter of
8 law. Even though KinderFarms has not made any claim that it was the “originator”
9 of the clean OTC medicine industry, Genexa claims that this is implied from
10 statements made by KinderFarms’ co-founder on national talk shows where she
11 recounted her personal experiences as a mother. While Genexa is deliberately
12 misinterpreting these public statements, in any event, it is well-established that claims
13 to “invent” or “originate” a product constitute mere puffery.

14 Genexa also asserts an implausible false advertising theory that claims the co-
15 founder statement on the back of KinderFarms’ package would lead a reasonable
16 consumer to disregard clear overdose warnings directly below and adjacent to the
17 statement. No reasonable consumer would interpret the package in this manner, and
18 the claim should be dismissed as a matter of law.

19 At bottom, Genexa has sour grapes that another company has chosen to offer
20 clean OTC medicine for children. In the midst of a national shortage, now is not the
21 time for irresponsible lawsuits asserting bogus theories in an attempt to restrict supply.
22 Genexa did not serve KinderFarms with a cease-and-desist letter or seek any non-
23 judicial mechanism to resolve any genuine issue it may have. Rather, it conducted,
24 at best, a superficial investigation and filed this meritless lawsuit.

25 After Genexa filed this lawsuit, KinderFarms and one of its investors provided
26 Genexa with evidence refuting its allegations and warned Genexa that continued
27 prosecution of this case raises ethical concerns. Genexa has, at present, refused to
28 dismiss this lawsuit. As such, KinderFarms must defend itself and bring this Motion.

II. BACKGROUND

A. Parties

Genexa alleges that it is an Atlanta-based company founded in 2014 with the goal of providing consumers with clean alternatives to OTC medicine products. (Compl. ¶ 15.) By “clean” alternatives, Genexa explains that its medicine products use the same effective, active ingredients in OTC products produced by conventional pharmaceutical companies, but without the artificial inactive ingredients such as “artificial preservatives, dyes, sweeteners, or common allergens.” (*Id.* ¶¶ 14-16.) Genexa was a homeopathy and dietary supplements company exclusively until it launched its OTC products in 2020.

KinderFarms is a limited liability company headquartered in Redondo Beach that produces clean products for infants and children sold in the Kids and Baby OTC drug aisles. (*Id.* ¶ 9.) KinderFarms produces a wide range of products for parents who want clean alternatives for their infants and children. In 2019, KinderFarms released, as its first line of products, clean electrolyte beverage products using the KinderLyte trade name. (*Id.* ¶ 30.) In 2021, KinderFarms released, as its second line of products, organic protein shakes using the KinderSprout trade name. (*Id.*) In 2022, KinderFarms released a line of clean OTC medicine products using the trade name KinderMed. (*Id.* ¶ 33.)

B. Summary Of Genexa’s Allegations

Genexa asserts three theories of liability: (1) KinderFarms “copied” Genexa’s OTC medicine products and packaging; (2) KinderFarms engaged in false advertising by claiming to be the “originator” of the clean OTC medicine industry and that its products are “non-toxic”; and (3) KinderFarms interfered with Genexa’s contracts with a potential investor and former employee. These theories are summarized below.

1. Genexa Claims KinderFarms Copied Products and Packaging That Were Already in the Public Domain

Genexa claims that, in its view, “[v]irtually everything” about KinderFarms’

1 OTC medicine products “copies or mimics Genexa’s products.” (Compl. ¶ 35.)
 2 Genexa alleges that KinderFarms “copied” Genexa by using the same names to
 3 describe the products (*id.* ¶¶ 35-36), the same or similar ingredients (*id.* ¶ 37), and the
 4 same packaging (*id.* ¶¶ 38-39). Genexa alleges that this “copying” creates the
 5 “prospect of confusion and reverse confusion in the marketplace” in violation of
 6 Section 43(a) of the Lanham Act. (*Id.* ¶ 66.)

7 Genexa claims that it chose names for its products that were “arbitrary and
 8 different” from those commonly used by conventional pharmaceutical companies
 9 because Genexa used the term “Kids” as opposed to “Children’s” and an ampersand
 10 (“&”) instead of the word “and.” (*Id.* ¶ 36.) So, according to Genexa, the
 11 conventional OTC medicine products were named “Children’s Pain and Fever” and
 12 Genexa made an “arbitrary” decision to change that name to “Kids’ Pain & Fever.”
 13 (*Id.*) Genexa fails to allege, however, that it owns any trademark rights in the
 14 description of its products, that the descriptions of its products have acquired
 15 secondary meaning among consumers, or that it owns any copyrights in those product
 16 descriptions. *See Higgins v. Keuffel*, 140 U.S. 428, 431 (1891) (copyright law does
 17 not protect mere labels or titles which “simply designate or describe the articles to
 18 which they are attached”).

19 As for its ingredient claims, Genexa claims that it came up with a novel method
 20 of using agave syrup and citrus extract to replace artificial preservatives in
 21 conventional OTC medicine products (Compl. ¶ 17), but KinderFarms’ OTC
 22 medicine products use citric acid—not citrus extract¹ (*id.* ¶ 37.) Genexa alleges that
 23 its products were first sold to the public in 2020 (*id.* ¶ 21), but Genexa fails to allege
 24 that it owns any patents in its OTC medicine products or the method to produce those
 25

26 _____
 27 ¹ The FDA defines citric acid as the compound “2-hydroxy-1,2,3-
 28 propanetricarboxylic acid.” 21 C.F.R. § 184.1033(a). The FDA defines extracts and
 essential oils differently. *See id.* § 182.20.

1 products. Genexa's products are therefore in the public domain. *Sears, Roebuck &*
 2 *Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964) ("An unpatentable article, like an article
 3 on which the patent has expired, is in the public domain and may be made and sold
 4 by whoever chooses to do so."); *see also Bonito Boats, Inc. v. Thunder Craft Boats,*
 5 *Inc.*, 489 U.S. 141, 149 (1989) ("Once an inventor has decided to lift the veil of
 6 secrecy from his work, he must choose the protection of a federal patent or the
 7 dedication of his idea to the public at large.").

8 As for its packaging claims, Genexa alleges that the layouts of the packages are
 9 "almost identical, as are the color, design, type font, and other wholly arbitrary design
 10 elements," such as the placement of the founder statement, the description of the
 11 ingredients, the use of a tag line, and the use of an animal on the front. (*See Compl.*
 12 ¶ 39.) Genexa does not allege that any of these "design" elements are protectable
 13 intellectual property or that any of these elements have acquired secondary meaning
 14 among consumers. (*Id.*) Genexa shows a photograph of its kids' pain and fever
 15 product compared to KinderFarms' kids' pain and fever product (*id.* ¶ 38), but it does
 16 not include photographs of Genexa's and KinderFarms' other products.

17 **2. Genexa's False Advertising Claims**

18 Genexa's second theory is that KinderFarms falsely markets and advertises its
 19 OTC medicine products. Genexa claims that it was the "originator" of the clean OTC
 20 medicine industry, but that KinderFarms is attempting to convince customers that it
 21 is the "originator" of this industry. (*Compl.* ¶ 40.) Genexa does not allege that
 22 KinderFarms made any affirmative statement claiming to be the "originator" of this
 23 industry. (*Id.*) Genexa does not allege that KinderFarms made any claim that its
 24 products were the first and only products in the market. (*Id.*) Genexa does not allege
 25 that KinderFarms made any statement that references Genexa in any way. (*Id.*)
 26 Instead, Genexa alleges that KinderFarms made this "originator" claim by implication
 27 through public statements by KinderFarms' co-founder when she appeared on
 28 national talk shows. (*Id.*)

Genexa also alleges that KinderFarms markets its products as “non-toxic,” which, according to Genexa, is false and misleading. (*Id.* ¶¶ 44-51.) Genexa admits that the active ingredients in KinderFarms’ products have been approved by the FDA and are safe for infants and children when taken in appropriate dosages (*id.* ¶ 46), and it does not allege that any of the inactive ingredients in KinderFarms’ products are toxic. Instead, Genexa claims that the term “non-toxic” is false and misleading because consumers can have adverse health outcomes if they use the medicine with “impunity” far in excess of FDA-recommended guidelines. (*Id.* ¶¶ 46-51.) The Complaint shows that KinderFarms’ products contain the FDA-required warnings—including overdose warnings—on the packaging and directly underneath and adjacent to the challenged statement. (*Id.* ¶ 37.)

3. Genexa’s Interference Allegations

Genexa’s third theory is that KinderFarms interfered with Genexa’s contracts with a potential investor who declined to invest and a former employee. As to the former investor, Genexa alleges “on information and belief” that the investor signed an NDA with Genexa, obtained Genexa’s confidential information during the due diligence phase, and breached the NDA by sharing that information with KinderFarms. (Compl. ¶¶ 52-59.)

As to the former employee (Annika Berman (“Berman”)), Genexa alleges, again on “information and belief,” that KinderFarms induced Berman to work on its FDA filings while she was still employed by Genexa. (*Id.* ¶¶ 60-62.) Genexa alleges that Berman took a day off work before she resigned to assist KinderFarms with its FDA filings which were made on that same day and that Berman was essential for KinderFarms to prepare and make the necessary filings. (*Id.*)

These allegations are easily disproven, and the interference claims are subject to dismissal on summary judgment.

C. Procedural History

Genexa filed the Complaint on December 22, 2022. [ECF Dkt. No. 1.] It

1 alleges violations of Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)),
2 violations of California’s False Advertising Law (Cal. Bus. & Prof. Code §§ 17500 *et*
3 *seq.*), and interference with contract and unfair competition in violation of
4 California’s Unfair Competition Law (“UCL”) (Cal. Bus. & Prof. Code §§ 17200 *et*
5 *seq.*).

6 After Genexa filed the Complaint, KinderFarms and its investor served Genexa
7 with written correspondence refuting the factual claims set forth in the Complaint and
8 attaching documentary evidence directly refuting Genexa’s claims. (Declaration of
9 David W. Schechter (“Schechter Decl.”) ¶ 2.)

10 On January 3, 2023, KinderFarms served Genexa with a letter per Local Rule
11 7-3 setting forth the pleading deficiencies in the Complaint and informing Genexa
12 that KinderFarms will move to dismiss and strike certain claims and allegations in the
13 Complaint. (*Id.* ¶ 3.) Counsel for the parties met and conferred by telephone on
14 January 6, 2023. (*Id.* ¶ 4.) Despite counsel’s efforts, the parties could not reach
15 agreement on the issues, thus necessitating this Motion. (*Id.*)

16 **III. LEGAL STANDARDS**

17 **A. Rule 12(b)(6) Motion to Dismiss**

18 A district court must dismiss a complaint if it fails to state a claim upon which
19 relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a 12(b)(6) motion, the
20 plaintiff must allege “enough facts to state a claim to relief that is plausible on its
21 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially
22 plausible when the plaintiff pleads facts that “allow[] the court to draw the reasonable
23 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
24 556 U.S. 662, 678 (2009). There must be “more than a sheer possibility that a
25 defendant has acted unlawfully.” *Id.*

26 District courts in the Ninth Circuit apply a heightened pleading standard for
27 false advertising claims. *Tracy Anderson Mind & Body, LLC v. Roup*, 2022 WL
28 17670418, at *4 (C.D. Cal. Dec. 12, 2022); *EcoDisc Tech. AG v. DVD Format/Logo*

1 *Licensing Corp.*, 711 F. Supp. 2d 1074, 1085 (C.D. Cal. 2010) (“Although the Ninth
2 Circuit has not concluded that Rule 9(b) applies to Lanham Act claims, many district
3 courts have applied this heightened pleading standard to claims that are grounded in
4 fraud, such as misrepresentation claims.”). “To satisfy Rule 9(b), Plaintiff must state
5 the ‘time, place, and specific content of the false representations as well as the
6 identities of the parties to the misrepresentation.’” *EcoDisc Tech.*, 711 F. Supp. 2d at
7 1085 (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393,
8 1401 (9th Cir. 1986)). Plaintiffs must also set forth what is false and misleading about
9 the statement and why it is false. *Id.* (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
10 1097, 1106 (9th Cir. 2003)).

11 In deciding whether the plaintiff has stated a claim upon which relief can be
12 granted, the court accepts the plaintiff’s allegations as true and draws all reasonable
13 inferences in favor of the plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561
14 (9th Cir. 1987). However, the court is not required to accept as true “allegations that
15 are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”
16 *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

17 **B. Rule 12(f) Motion To Strike**

18 “The court may strike from a pleading an insufficient defense or any redundant,
19 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “The function
20 of a 12(f) motion to strike is to avoid the expenditure of time and money that must
21 arise from litigating spurious issues by dispensing with those issues prior to trial”
22 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citation
23 omitted).

24 **C. Anti-SLAPP Special Motion To Strike**

25 The anti-SLAPP statute, California Code of Civil Procedure section 425.16,
26 “was enacted to allow early dismissal of meritless first amendment cases aimed at
27 chilling expression through costly, time-consuming litigation.” *Metabolife Int’l, Inc.*
28 *v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001). Anti-SLAPP motions are evaluated in

1 two steps. First, the movant must make a threshold showing that the act or acts giving
2 rise to the claim were in furtherance of the right of petition or free speech or in
3 connection with a public issue. Cal. Civ. Proc. Code § 425.16(b)(1); *see, e.g., Hilton*
4 *v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010) (applying California’s anti-
5 SLAPP law).

6 Second, if the movant meets its burden, the nonmovant must show a probability
7 of prevailing on the challenged claim. *Hilton*, 599 F.3d at 903. A nonmovant satisfies
8 this burden by showing that the claim is legally sufficient and supported by a *prima*
9 *facie* showing of facts sufficient for a judgment in the nonmovant’s favor if the
10 evidence relied on is credited. *See Navellier v. Sletten*, 29 Cal. 4th 82, 88-89 (2002).

11 Ninth Circuit courts apply the anti-SLAPP statute to California state law claims
12 brought in federal court. *Vess*, 317 F.3d at 1109. Where “a defendant makes a special
13 motion to strike based on alleged deficiencies in the plaintiff’s complaint, the motion
14 must be treated in the same manner as a motion under Rule 12(b)(6).” *Planned*
15 *Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir.
16 2018) (citation omitted).

17 **IV. ARGUMENT**

18 **A. Genexa Fails To State A Claim For Trade Dress Infringement**

19 Genexa alleges that KinderFarms’ statements and packaging that “copy”
20 Genexa’s packaging create consumer confusion and reverse confusion in violation of
21 Section 43(a) of the Lanham Act. (Compl. ¶ 66(a).) This is an attempt to allege
22 infringement of unregistered trade dress. *Lexmark Int’l, Inc. v. Static Control*
23 *Components, Inc.*, 572 U.S. 118, 122 (2014) (“Section 1125(a) thus creates two
24 distinct bases of liability: false association, § 1125(a)(1)(A), and false advertising,
25 § 1125(a)(1)(B).”). During the meet and confer, Genexa claimed that it was not
26 asserting a trade dress infringement claim, but rather was only asserting false
27 advertising under 15 U.S.C. § 1125(a)(1)(B). (Schechter Decl. ¶ 5.) But “copying”
28 and “customer confusion” are only relevant for false association (i.e., trademark

infringement) claims. *Hokto Kinoko Co. v. Concord Farms, Inc.*, 738 F.3d 1085, 1095 (9th Cir. 2013) (“The *sine qua non* of trademark infringement is consumer confusion.”); *Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir. 1998) (applying the *Sleekcraft* factors in reverse confusion cases, including strength or arbitrariness of the mark; the relatedness of the parties’ goods; and the similarity of the marks); *Apple Inc. v. Amazon.com Inc.*, 915 F. Supp. 2d 1084, 1090 (N.D. Cal. 2013) (summarily dismissing the false advertising count as an infringement claim improperly packaged as a false advertising claim). Like the failed attempts of other plaintiffs, Genexa frames its “copying” allegations as false advertising to lower its evidentiary burden, which it cannot do. *See, e.g., Parks LLC v. Tyson Foods, Inc.*, 863 F.3d 220, 226, 230 (3d Cir. 2017) (rejecting plaintiff’s attempt to frame a false association claim as a false advertising claim, which required less proof); 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:9 (5th ed. Dec. 2022 Update) (“An unregistered trademark infringement (or ‘false association’) claim cannot be re-packaged as a false advertising claim in order to avoid having to prove the validity of a trademark.”).)

Thus, to support its “copying” and “customer confusion” allegations, Genexa must state a claim for infringement of its unregistered trademarks or trade dress. This includes asserting plausible allegations that it owns valid trademark rights that KinderFarms infringed.

1. Genexa Fails to Define Its Trade Dress

It is the “plaintiff’s duty to ‘articulat[e] the specific elements which comprise its distinct dress.’” *Fair Wind Sailing, Inc. v. Dempster*, 764 F.3d 303, 309 (3d Cir. 2014) (alteration in original) (quoting *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 381 (2d Cir. 1997); McCarthy, *supra*, § 8.3 (“[T]he discrete elements which make up [the trade dress claim] must be separated out and clearly identified in a list.”). “This allows the district court to ensure that the claim is not ‘pitched at an improper level of generality, i.e., the claimant [does not] seek[]

1 protection for an unprotectable style, theme or idea.” *Fair Wind Sailing*, 764 F.3d at
2 309 (alterations in original) (quoting *Landscape Forms*, 113 F.3d at 381).

3 Courts routinely dismiss unregistered trade dress claims where plaintiffs fail to
4 specify the claimed trade dress. *See, e.g., R & A Synergy LLC v. Spanx, Inc.*, 2019
5 WL 4390564, at *5 (C.D. Cal. May 1, 2019) (plaintiff failed to identify “with
6 sufficient specificity” a protectable trade dress in a basic design of a sleeved
7 undergarment); *Sleep Sci. Partners v. Lieberman*, 2010 WL 1881770, at *3 (N.D. Cal.
8 May 10, 2010) (dismissing claim of infringement of a website’s “look and feel” as an
9 inadequate description because “[w]ithout an adequate definition of the elements
10 comprising the website’s ‘look and feel,’ [defendant] is not given adequate notice”);
11 *Homeland Housewares, LLC v. Euro-Pro Operating LLC*, 2014 WL 6892141, at *3
12 (C.D. Cal. Nov. 5, 2014) (dismissing a definition of “color scheme, fonts,
13 phraseology, and overall look and feel” of blender packaging as too vague).

14 Instead of listing the distinctive features of its package that constitute source-
15 identifying trade dress, Genexa lists the elements of its package that are, in its view,
16 similar to KinderFarms’ package. (Compl. ¶¶ 35-39.) But Genexa makes no claim
17 that the allegedly similar elements are part of Genexa’s distinctive and protectable
18 “trade dress.”

19 Genexa’s claim cannot be saved because it included pictures in the Complaint.
20 *Crafty Prods., Inc. v. Michaels Cos., Inc.*, 424 F. Supp. 3d 983, 993 (S.D. Cal. 2019)
21 (dismissing with prejudice on a Rule 12(b)(6) motion a claim for infringement of
22 alleged trade dress in various wooden mask designs, as “the Court decline[d] to
23 independently inspect each and every exhibit and scour the pictures for one design
24 that is entirely nonfunctional”), *aff’d* 839 F.. App’x 95 (9th Cir. 2020); *see also Int’l*
25 *Leisure Prods., Inc. v. FUNBOY LLC*, 747 F. App’x 23, 26 (2d Cir. 2018) (“[A] visual
26 representation of the asserted trade dress does not excuse ‘the party seeking
27 protection’ from its burden of ‘point[ing] to the elements and features that *distinguish*
28 its trade dress.’” (second alteration in original) (citation omitted)). It was Genexa’s

burden to specify its claimed trade dress and not show pictures that require the Court and KinderFarms to guess as to what Genexa's alleged "trade dress" actually is. The claim should be dismissed on this basis alone.

2. Genexa's Alleged Trade Dress Is Functional

A plaintiff suing for infringement of unregistered trade dress must allege that the asserted trade dress is not functional. *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001). The Supreme Court split functionality into two types, each with its own legal test. *Id.* at 32-33. The two types are "utilitarian functionality," which is based on how well the product works, and "aesthetic functionality," which is based on how good the product looks. *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 865 (9th Cir. 2020). Using the four-factor *Disc Golf* test, a claimed trade dress has utilitarian functionality if it is essential to the use or purpose of a product or affects its cost or quality. *Id.* (citing *Disc Golf Ass'n, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002 (9th Cir. 1998)). A claimed trade dress has aesthetic functionality if it serves "an aesthetic purpose wholly independent of any source identifying function," such that the trade dress's protection under trademark law "would impose a significant non-reputation-related competitive disadvantage" on its owner's competitors. *Id.* (citation omitted).

Genexa's claimed "trade dress," as vaguely alleged in the Complaint, is some undefined combination of the placement of founder statements, ingredient lists, and descriptive names for products (i.e., Kids' Pain & Fever). Each one of these components is clearly functional—they describe the product and how to use it. That is not protectable trade dress. *See, e.g., Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 1007 (C.D. Cal. 2011) (recognizing certain packaging features as functional).

In fact, Genexa admits that these elements are functional. For example, Genexa admits that the layout and marketing tag lines associated with its ingredient list are designed "to provide families with full transparency and make it easy for families to see what ingredients appear in the OTC products they buy." (Compl. ¶ 26.) Genexa's

1 trade dress claim fails for this separate and independent reason.

2 **3. There Is No Alleged Secondary Meaning**

3 If the product packaging is not inherently distinctive, a plaintiff making a trade
4 dress claim must plead and prove that its packaging design has acquired secondary
5 meaning. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767 (1992). The
6 predominant test for inherent distinctiveness asks whether “(1) the design or shape is
7 a common, basic shape or design; (2) it was unique or unusual in a particular field;
8 and (3) it was a mere refinement of a commonly-adopted and well-known form of
9 ornamentation for a particular class of goods which consumers view as mere
10 ornamentation.” *Mattel*, 782 F. Supp. 2d at 1004 (citation omitted).

11 Genexa does not plausibly allege that its packaging is inherently distinctive,
12 and it has not alleged that its packaging or any specific design element thereof has
13 acquired secondary meaning. Nowhere in the Complaint does Genexa even allege,
14 let alone plausibly so, that the placement of its ingredient list, the placement of its
15 founder statement, or the description of the nature and use of its product has acquired
16 secondary meaning. The claim fails for this independent reason. *See Zekkariyas v.*
17 *Universal Music-MGB Songs*, 2011 WL 13220325, at *2 (C.D. Cal. June 6, 2011)
18 (granting motion to dismiss under *Twombly* for failure to plausibly allege plaintiff’s
19 name had acquired a secondary meaning); *Advertise.com, Inc. v. AOL, LLC*, 2010 WL
20 11519510, at *1-2 (C.D. Cal. Mar. 23, 2010) (granting motion to dismiss for failing
21 to adequately allege an unregistered trademark had acquired a secondary meaning).

22 **4. There Is No Alleged Likelihood of Confusion**

23 “The test for likelihood of confusion is whether a ‘reasonably prudent
24 consumer’ in the marketplace is likely to be confused as to *the origin* of the good or
25 service bearing one of the marks.” *Dreamwerks Prod. Grp.*, 142 F.3d at 1129
26 (emphasis added). Additionally, there is a heightened standard when the ordinary
27 consumer is “discriminating,” in the sense that he or she will look more closely at the
28 product before making a purchasing decision. *See, e.g., Luigino’s, Inc. v. Stouffer*

1 *Corp.*, 170 F.3d 827, 831-32 (8th Cir. 1999) (diet-conscious consumers tend to
2 examine food packages more carefully to determine source and caloric content). This
3 is particularly true with respect to parents purchasing medicine for their children,
4 especially parents looking for “clean” medicine as Genexa admits. (Compl. ¶ 27
5 (“Genexa takes pride in providing families, many of whom are exceptionally skeptical
6 of the ‘Big Pharma’ OTC medicinal products available, with products they can
7 trust.”).)

8 Nowhere in the Complaint has Genexa alleged confusion as to the source or
9 origin of the products. Rather, Genexa claims KinderFarms has created confusion as
10 to (1) “which company is the innovator,” (2) whether other clean medicine products
11 are available to consumers, (3) whether KinderFarms is the original clean medicine
12 company and (4) a “reverse confusion” impression that Genexa copied KinderFarms.
13 (*Id.* ¶¶ 41-43.) None of these claims are actionable under the Lanham Act as trade
14 dress infringement because they do not allege confusion with respect to origin or
15 source. *Dreamwerks Prod. Grp.*, 142 F.3d at 1129.

16 Furthermore, there are so many fundamental and stark differences between the
17 packaging of each party’s respective products that any claim of customer confusion
18 is implausible. *Iqbal*, 556 U.S. at 678; *see, e.g., Miller v. Easy Day Studios Pty Ltd.*,
19 2021 WL 4209205, at *8 (S.D. Cal. Sept. 16, 2021) (dismissing trademark claim on
20 the pleadings as plaintiff’s allegations of customer confusion were simply not
21 plausible on their face). A few examples illustrate the point:

	Genexa	KinderMed
Tradename	The tradename Genexa is centered at the top with letters reading left to right all in bold ²	The tradename KinderMed is on the left side perpendicular to the other text with letters reading bottom to top with a

26 ² The font is also different. For example, the “e” in Genexa has a horizontal line in
27 the middle to complete the letter, whereas the “e” in KinderMed has an upward
28 sloping line to complete the letter.

		mix of bold and non-bold font
Product Description	Genexa describes its product as “Kids’ Pain & Fever” in the bottom portion with “Kids’ Pain” in the first line and “& Fever” in the second line	KinderFarms describes its product near the top of the package, and it inserts “Ages 2-11 years” after “Kids” on the first line with “Pain & Fever” on the second line
Tag Line	Genexa includes its tag line “Real Medicine Made Clean” underneath its tradename in the middle of the upper portion of the package with text only on two horizontal lines	KinderMed includes its tag line in the upper right-hand corner of the package with the tagline “Real Medicine Kinder Ingredients” in two arched lines that together form a circle around the “The Kinder Pledge”
Package Design	Genexa uses black and white text with a female lion (a real animal) in red in the center of the front of the package sitting underneath an orange sun	KinderMed uses blue, silver and pink text with a multi-colored unicorn (not a real animal) on the bottom of the front of the package peering over a thick blue border (like a baby standing up in his or her crib) with stars, clouds and a rainbow as the image continues on the right-hand side
Ingredient List	Genexa uses a drawing of a bottle and lists its ingredients each in bubbles	KinderMed counts the ingredients (“5”) and shows that number while also separating the ingredients into real medicine and clean inactives using pink and blue font, with a rainbow, stars and clouds as a design on the bottom

(Compl. ¶ 38.) No reasonable consumer would be confused as to the source of these products.

This is even further demonstrated by the fact that both companies use different

1 tradenames. *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1134 (Fed. Cir.
 2 1993) (no likelihood of confusion as a matter of law even where there is evidence of
 3 secondary meaning where consumers are sophisticated and the products are sold
 4 under different names.). There is no claim that “KinderFarms” or “KinderMed” is in
 5 any way confusingly similar to “Genexa.”

6 Genexa fails to include images of the packaging for its other products. This
 7 was intentional, as it shows that Genexa does not use a red female lion to indicate the
 8 source of its products, and there is no way any reasonable consumer could be confused
 9 as to source. Genexa uses a pink or salmon colored whale to market its cough and
 10 congestion product. KinderMed uses a blue and green dragon.³



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 19 These images confirm that there is no likelihood of confusion, and any attempt
 20 to amend would be futile. Accordingly, the Court should dismiss Count I for failure
 21 to state a claim for false association under 15 U.S.C. § 1125(a)(1)(A) pursuant to Rule
 22 12(b)(6), and strike paragraphs 35-39, 43 and 66 pursuant to Rule 12(f).

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 3 “A court ‘need not accept as true allegations that contradict matters properly subject
 to judicial notice or by exhibit’” or other materials central to or incorporated by
 reference into the complaint, including allegedly false advertising. *Gershman v.*
Bayer HealthCare LLC, 2015 WL 2170214, at *2 (N.D. Cal. May 8, 2015) (citation
 omitted); *Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 883 (C.D. Cal. 2013)
 (considering allegedly false labeling).

B. Genexa Fails To State A Claim For False Advertising

A false advertising claim under 15 U.S.C. § 1125(a)(1)(B), as Genexa attempts here, requires “a ‘false or misleading representation of fact’ ‘in commercial advertising or promotion’ that ‘misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.’” *Prager Univ. v. Google LLC*, 951 F.3d 991, 999 (9th Cir. 2020) (citation omitted). Such a claim requires a plaintiff to allege and prove: “(1) defendants’ false statement of fact in a commercial advertisement about its own or another’s product; (2) the statement actually or tended to deceive a substantial segment of its audience; (3) the deception is material and is likely to influence a purchasing decision; (4) defendants caused the false statement to enter interstate commerce; and (5) the plaintiff is or is likely to be injured due to the false statement, whether through direct diversion of sales or by a lessening of goodwill associated with plaintiff’s products.” *Cannarella v. Volvo Car USA LLC*, 2016 WL 9450451, at *7 (C.D. Cal. Dec. 12, 2016).

Genexa appears to allege two theories to support its false advertising claim brought under Section 43(a) of the Lanham Act. Neither theory is adequately alleged.

1. The “Originator” Claim Is Not Actionable

The Complaint does not allege that KinderFarms made any affirmative statements claiming to be the “originator” of the OTC clean medicine industry, but Genexa claims that statements by KinderFarms’ co-founder on social media and national talk shows could be construed to make this claim by implication. (Compl. ¶¶ 40-41.) Even assuming Genexa’s theory is based on reasonable inferences from KinderFarms’ public statements (which it is not), a claim to be an “originator” of an industry is mere puffery that is not actionable as a matter of law.

Puffery is defined as statements that are opinionated and outlandish such that no reasonable consumer would rely on them to make a purchasing decision. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir.

1 1990). Whether an alleged misrepresentation is a statement of fact or mere puffery is
 2 a legal question that may be resolved on a Rule 12(b)(6) motion. *Newcal Indus., Inc.*
 3 *v. Ikon Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008); *Cook, Perkiss & Liehe*, 911
 4 F.2d at 245-46.

5 By now, it is well-established that claims to be the inventor or “originator” of
 6 an idea are purely subjective and constitute mere puffery that are not actionable under
 7 the Lanham Act. *See, e.g., Tracy Anderson Mind & Body*, 2022 WL 17670418, at *5
 8 (finding “[c]laims that a defendant invented a product to fill a gap in the market, and
 9 the resulting implications regarding the innovativeness of a defendant’s product,
 10 constitute puffery rather than an assertion of fact”); *R & A Synergy*, 2019 WL
 11 4390564, at *10 (“Merely advertising a product as being new, invented, filling a white
 12 space, and being unlike other layering options does not amount to an assertion of
 13 fact.”); *Williams & Lake LLC v. Genesis Sys. LLC*, 2017 WL 6418937, at *8 (D. Ariz.
 14 Sept. 13, 2017) (defendants’ claims of authorship or inventorship of its vehicle
 15 braking system were not actionable false or misleading statements under the Lanham
 16 Act); *OptoLum, Inc. v. Cree, Inc.*, 244 F. Supp. 3d 1005, 1011 (D. Ariz. 2017)
 17 (holding that defendant’s assertion that its technology was a “genius idea” is purely
 18 subjective upon which no reasonable buyer would rely); *Tomek v. Apple, Inc.*, 2012
 19 WL 2857035, at *4 (E.D. Cal. July 11, 2012) (statements that the MacBook Pro is a
 20 “breakthrough” that provides “huge leaps in performance” were puffery); *Soilworks,*
 21 *LLC v. Midwest Indus. Supply, Inc.*, 575 F. Supp. 2d 1118, 1133 (D. Ariz. 2008)
 22 (holding that claims that a company was the “innovator” of a product constituted
 23 puffery because those claims are general, vague, and not measurable).

24 The recent decision by the Delaware District Court in *Peloton Interactive, Inc.*
 25 *v. ICON Health & Fitness, Inc.*, 2021 WL 2188219 (D. Del. May 28, 2021), is
 26 particularly instructive. That case involved a dispute between two at-home fitness
 27 companies. ICON claimed that its competitor, Peloton, engaged in false advertising
 28 under the Lanham Act when Peloton claimed that it is an “innovator” and a “very

1 hardcore technology company” that produces a bike that is “first of its kind.” The
2 court held that these statements were not objective statements of fact, but rather mere
3 puffery. *Id.* at *6 (statements like “new and improved” and “first of its kind” are
4 classic puffery). ICON also claimed that Peloton’s CEO falsely implied that Peloton
5 has no competitors when the CEO stated that, “[n]obody else provides them, so we’re
6 kind of a category of one.” *Id.* at *7. The court held that this too was not actionable
7 under the Lanham Act. *Id.* (collecting cases where courts found similar statements
8 like “a step above the rest” and “industry leader” to be mere puffery).

9 Accordingly, Genexa’s claims that KinderFarms engaged in false advertising
10 by making an *implied* claim to be the true “innovator” of the clean OTC medicine
11 industry (Compl. ¶¶ 40-41) fall well short of the mark. Any attempt to amend would
12 be futile, and therefore this claim should be dismissed without leave to amend.

13 2. Genexa’s “Non-Toxic” Theory Fails

14 Genexa claims that KinderFarms engaged in false advertising because the term
15 “non-toxic” gives consumers the false impression that they can take the medicine in
16 excess of the FDA recommended dosages that are on the package. (Compl. ¶¶ 47-
17 48.) Claims for false advertising must meet the heightened pleading requirements for
18 Rule 9(b). *Tracy Anderson Mind & Body*, 2022 WL 17670418, at *4. This requires
19 plaintiffs to not just allege the “who, what, when, why, where,” but also allege with
20 particularity how the challenged statements are false or misleading. *EcoDisc Tech.*,
21 711 F. Supp. 2d at 1085. Genexa’s “non-toxic” theory is not adequately alleged for
22 three reasons.

23 First, no reasonable consumer would read KinderFarms’ co-founder statement
24 on the back of the package and then disregard the numerous overdose warnings and
25 conclude that the product was safe to give his or her child a dosage that exceeded
26 directions on the package. When evaluating false advertising claims under the
27 Lanham Act, courts use a “reasonable consumer” test. *Becerra v. Dr. Pepper/Seven*
28 *Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019). Liability does not attach because

1 theoretically “some consumers could unreasonably misunderstand the product.” *Id.*
2 at 1230 (citing *Ebner v. Fresh, Inc.*, 838 F.3d 958, 966 (9th Cir. 2016)).

3 It is well-established that courts must take into account all the information
4 available to consumers and the context in which that information is provided and used.
5 *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. 2021) (citing *Bell v. Publix*
6 *Super Mkts., Inc.*, 982 F.3d 468, 477 (7th Cir. 2020)). Courts are not compelled to
7 accept a plaintiff’s unreasonable interpretation of an otherwise clear and accurate
8 statement. *Id.* at 882-83 (“[W]here plaintiffs base deceptive advertising claims on
9 unreasonable or fanciful interpretations of labels or other advertising, dismissal on the
10 pleadings may well be justified.” (citation omitted)).

11 Here, Genexa fails to plausibly allege how consumers could be misled into
12 believing that they could disregard the warnings and directions for use on the package.
13 (Compl. ¶ 38.) In large font underneath the heading **Warnings** it states “Severe liver
14 damage may occur if your child takes: ■ more than 5 doses in 24 hours, which is the
15 maximum daily amount ■ with other drugs containing acetaminophen.” (*Id.*) The
16 warnings continue in sections titled “**Do not use**” and “**Keep out of reach of**
17 **children.**” (*Id.*) There is also a specific warning about overdoses: “**Overdose**
18 **warning:** Taking more than the recommended dose (overdose) may cause liver
19 damage. In case of overdose, get medical help or contact a Poison Control Center (1-
20 800-222-1222) right away. Quick medical attention is critical even if you do not
21 notice any signs or symptoms.” (*Id.*)

22 Genexa’s theory is that consumers will read KinderFarms’ co-founder
23 statement about why the founders established the company and then completely
24 disregard these warnings to endanger their children. This theory is preposterous and
25 implausible. *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003); *see*
26 *id.* at 504 (rejecting a “least sophisticated consumer” standard).

27 In fact, Genexa’s Complaint alleges just the opposite. Genexa alleges that
28 consumers of its products and KinderFarms’ products are predominantly parents who

1 are looking for alternative medicine products *for their children*. (Compl. ¶¶ 27, 50.)
 2 These are not consumers of low-cost grocery items who buy the product solely based
 3 on misleading claims made in large font or in pictures prominently displayed on the
 4 front of the package. Rather, per Genexa’s own allegations, these are “consumers
 5 electing to purchase clean medicine products [who] *care about what they and their*
 6 *children are ingesting*.” (*Id.* ¶ 50 (emphasis added).)

7 Genexa also fails to allege that directions for use and product warnings are
 8 hidden or defective in some manner. And it could not make such an allegation
 9 because these are FDA-required warnings and directions that both companies display
 10 on their packaging as required and per good business practice to make sure consumers
 11 are informed about how to safely use the medicine. (*Id.* ¶ 38.)

12 Second, no reasonable consumer would think that “non-toxic” is a statement of
 13 fact about the active ingredient in the bottle. The founder statement, read in totality,
 14 makes clear that KinderFarms was founded to offer what it believes to be “cleaner
 15 options.” (*Id.* ¶ 44.) As Genexa admits in its Complaint, both Genexa and
 16 KinderFarms use the same active ingredient as existing products in the market but use
 17 different inactive ingredients. (*Id.* ¶ 16 (Genexa’s “clean” products use the same
 18 active ingredients as Tylenol, Mucinex, and Robitussin “but without any of the
 19 unnecessary artificial ingredients”), ¶ 34 (“Genexa and KinderFarms are the only two
 20 companies actively engaged in the production and sale of ‘clean’ OTC medicine
 21 products.”).) Genexa fails to assert any well-pled allegations of fact showing that a
 22 reasonable consumer would read “non-toxic” in KinderFarms’ founder statement as
 23 a reference to the actual pharmaceutical drug.

24 Third, even if some consumers could unreasonably construe the term “non-
 25 toxic” as a reference to the pharmaceutical drug and even if those few consumers
 26 could think that they could disregard the warnings on the package, the claim still fails
 27 because “non-toxic” is not an objective statement of fact about KinderFarms’ OTC
 28 medicine products. The Complaint reveals no industry accepted definition of “toxic”

1 or “non-toxic.” Indeed, the Complaint fails to allege any definition or standard by
2 which any court or trier-of-fact could determine whether a medicine product was
3 “toxic” or “non-toxic.” These are subjective and imprecise terms that are not “capable
4 of verification or refutation by means of objective proof.” *Phantom Touring, Inc. v.*
5 *Affiliated Publ’ns*, 953 F.2d 724, 728 n.7 (1st Cir. 1992).

6 At bottom, this is a preposterous claim made by a competitor who is grasping
7 at straws in an attempt to erect obstacles to legitimate competition. Genexa’s false
8 advertising claims are not actionable under the Lanham Act and should be dismissed.

9 **C. The State Law Claims Fail For The Same Reasons**

10 Genexa asserts its same “copying” and false advertising allegations that support
11 its Lanham Act claims also support claims for violations of the FAL and UCL.
12 (Compl. ¶¶ 77-85, 97-99.) But these claims fail for the same reasons as above.

13 The Ninth Circuit “has consistently held that state common law claims of unfair
14 competition and actions pursuant to California Business and Professions Code
15 § 17200 are ‘substantially congruent’ to claims under the Lanham Act.” *Cleary v.*
16 *News Corp.*, 30 F.3d 1255, 1262–63 (9th Cir. 1994). And courts in this circuit have
17 repeatedly dismissed derivative UCL claims as a result. *See Sybersound Records,*
18 *Inc. v. UAV Corp.*, 517 F.3d 1137, 1153 (9th Cir. 2008) (affirming dismissal of UCL
19 claim where plaintiff could not state a claim under the Lanham Act, among other
20 grounds); *Japan Telecom, Inc. v. Japan Telecom Am. Inc.*, 287 F.3d 866, 875 (9th Cir.
21 2002) (plaintiff’s “California unfair competition claim fails because its related
22 Lanham Act claims fail”); *R & A Synergy*, 2019 WL 4390564, at *15 (“Plaintiff’s
23 state law claim for unfair competition realleges the same facts and reasserts the same
24 arguments as embodied by Plaintiff’s Lanham Act claims”).

25 **D. Genexa’s “Originator” Claim And Supporting Allegations Should**
26 **Be Stricken Per California’s Anti-SLAPP Statute**

27 In evaluating an anti-SLAPP motion, the court engages in a two-step analysis.
28 First, the court “decides whether the defendant has made a threshold showing that the

1 challenged cause of action is one ‘arising from’ protected activity.” *City of Cotati v.*
 2 *Cashman*, 29 Cal. 4th 69, 76 (2002); Cal. Civ. Proc. Code § 425.16(b)(1). Once that
 3 showing is made, the burden shifts to the plaintiff to “establish[] that there is a
 4 probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code
 5 § 425.16(b)(1).

6 **1. Genexa’s “Originator” Claim Arises from Protected Activity**

7 California’s anti-SLAPP statute identifies two categories of protected activity
 8 applicable here: (1) any written or oral statement or writing made in a place open to
 9 the public or a public forum in connection with an issue of public interest, or (2) any
 10 other conduct in furtherance of the exercise of the constitutional right of petition or
 11 the constitutional right of free speech in connection with a public issue or an issue of
 12 public interest. Cal. Civ. Proc. Code § 425.16(e)(3)-(4).

13 For the anti-SLAPP statute to apply, it suffices if just part of the challenged
 14 cause of action arises from one of these protected activities. *See Fox Searchlight*
 15 *Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 308 (2001) (plaintiff “cannot
 16 frustrate the purpose of the SLAPP statute [by] combining allegations of protected
 17 and nonprotected activity under the label of one ‘cause of action’”). The “public
 18 interest” requirement is construed broadly. *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal.
 19 App. 4th 1027, 1042 (2008).

20 Speech is considered “in connection with an issue of public interest” if it
 21 concerns: (1) “a person or entity in the public eye”; (2) “conduct that could directly
 22 affect a large number of people beyond the direct participants”; or (3) “a topic of
 23 widespread, public interest.” *Rivero v. Am. Fed’n of State, Cty., & Mun. Emps., AFL–*
 24 *CIO*, 105 Cal. App. 4th 913, 924 (2003). Here, Genexa’s claim falls within all three.

25 As alleged in the Complaint, KinderFarms’ co-founder is a “famous actress”
 26 who, at various times, appeared on a series of television talk shows to discuss
 27 children’s medicine in front of a national audience. (Compl. ¶ 4.) In support of its
 28 Lanham Act, false advertisement, and unfair competition claims, Genexa seeks to

1 hold KinderFarms liable for a “personal anecdote” whereby its co-founder recounts
 2 her son’s illness and her personal realization that she did not understand the
 3 ingredients in the available OTC children’s medicine offerings and that she wanted to
 4 create an alternative for parents who share her values. (*Id.* ¶ 40).

5 Because these alleged statements were made in a “public forum in connection
 6 with an issue of public interest” and constitute “other conduct in furtherance of the
 7 exercise of . . . the constitutional right of free speech in connection with a public issue
 8 or an issue of public interest,” prong one of the anti-SLAPP law is satisfied. Cal. Civ.
 9 Proc. Code § 425.16(e)(3)-(4); *Tracy Anderson Mind & Body, LLC*, 2022 WL
 10 17670418, at *9 (C.D. Cal. Dec. 12, 2022).

11 **2. Genexa’s Claim Lacks Probable Merit**

12 Per Section IV.B.1 *infra*, any claim to be an “originator” or inventor” of a
 13 product or industry constitutes mere puffery as a matter of law that cannot be
 14 actionable under California’s FAL or UCL. Thus, Genexa’s claim lacks probable
 15 merit, and KinderFarms is entitled to its attorneys’ fees and costs. Cal. Civ. Proc.
 16 Code § 425.16(c)(1) (“[A] prevailing defendant on a special motion to strike shall be
 17 entitled to recover that defendant’s attorney’s fees and costs.”); *Bernardo v. Planned*
 18 *Parenthood Fed’n of Am.*, 115 Cal. App. 4th 322, 364 (2004).⁴

19 **V. CONCLUSION**

20 For the foregoing reasons, the Court should grant the Motion.

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 27 ⁴ KinderFarms will file a separately noticed motion to establish the amount of those
 28 fees and costs.

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